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Supreme Court of the United States

No. 263.

JOSEPH F. BENT AND WILLIAM AMOS JONES,
PETITIONERS,

VS.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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No. 263.

JOSEPH F. BENT AND WILLIAM AMOS JONES,
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VS.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the United States Supreme Court, and the Honorable Judges Thereof:

Joseph F. Bent and William Amos Jones, petitioners pray a rehearing on their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the case of United States of America, Appellant, vs. Joseph F. Bent and William Amos Jones, Appellees, No. 13906, entered June 20th, reversing the order of the United States District Court for the Western District of Missouri that was rendered December 3rd, 1948, said order setting aside judgment and sentence of petitioners, rendered against petitioners on July 10th, 1946, on count two of their indictment.

OPINIONS BELOW.

Circuit Court of Appeals Opinion (R. 14-23) is reported at 175 F. 2d 397. District Court Opinion (R. 6-10). Order of Supreme Court entered October 10th, 1949, official citation unknown as yet to petitioners.

JURISDICTION.

The order of the Supreme Court of the United States denying certiorari was entered on October 10th, 1949, and by a timely application to this court, an order extending the time to file this petition for rehearing to and including November 14th was made by Judge Fred M. Vinson, Chief Justice of the United States. This petition is being filed on or before November 14th, 1949. The jurisdiction of this court is invoked under 28 U. S. C. A., Sec. 1254 (1). See also, Rule 37 (b) of the Federal Rules of Criminal Procedure, promulgated by the Court February 8th, 1946, and Rule 33 of the Rules of the Supreme Court of the United States as amended October 13th, 1947.

QUESTIONS PRESENTED.

From the whole record in the case, is it not clear, that Count II of petitioners' Indictment stated no offense against the United States of America? If so, will not this court recognize and correct this error and correct under its power to recognize plain errors affecting substantive rights as provided in Rule 27 of the Rules of the Supreme Court, 28 U. S. C. A. foll. Sec. 354.

STATUTE INVOLVED.

Section 197 of the Criminal Code (18 U. S. C. (1946 ed.) 320, now 18 U. S. C. 2114) provided:

> Whoever shall assault any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or any part thereof, or shall rob any such person of such mail matter, or of any money, or other property of the United States, or any part thereof, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, money, or other property of the United States, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

AMENDMENTS V AND VI OF THE CONSTITUTION AND FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 52, of the Federal Rules of Criminal Procedure, is as follows:

> "Rule 52—Harmless Error and Plain Error.
>
> (a) Harmless Error. Any error, defect, irregularity, or variance, which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the Court."

As shown by the notes of the Advisory Committee on Rules, Rule 52 (a) is a re-statement of existing law 28

U. S. C. A., Sec. 391, and with reference to indictments is a re-statement of the law 18 U. S. C. A., Sec. 556. This rule pertains to formal or technical defects which do not affect the substantial rights of a defendant. Rule 52 (b) is a re-statement of existing law (*Wiborg* v. *U. S.*, 163 U. S. 632, 658, 16 S. Ct. 1127, 1197—and many other decisions).

Rule 52 embraces Rule 27 of the Rules of the Supreme Court, 28 U. S. C. A. foll. Section 354, which provides that errors not specified will be disregarded, save as the Court, at its option, may notice a plain error not assigned or specified.

Constitution of the United States—

Amendment (V).

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment (VI).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT.

On May 28, 1946, petitioners were indicted in the District Court for the Western District of Missouri in three counts (R. 1-3, 6). As to petitioners Bent and Jones, the charges in the first two counts were as follows (R. 1-3):

> *Count I*—On or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did rob Luther H. Kieffer, clerk in charge of Contract Station No. 44 of Kansas City, Missouri Post Office, located at 5744 Prospect, of One Hundred Twenty-nine Dollars ($129.00) in lawful money belonging to the United States, said money being then and there in the custody of the said Luther H. Kieffer.
>
> *Count II*—That on or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did, by the use of a dangerous weapon, put in jeopardy the life of Luther H. Kieffer, clerk in charge of Contract Station No. 44 of Kansas City, Missouri Post Office, located at 5744 Prospect.

In each of these two counts a third defendant, Collins, was alleged to have aided and abetted petitioners. The third count involved all three defendants and charged a conspiracy to commit the robbery.

All the defendants first pleaded not guilty. Later, however, petitioners changed their pleas on counts 1 and 3 to guilty which were accepted by the court on July 8, 1946, and reserved their pleas on the second count until after the trial of Collins. Collins was acquitted after trial before the court without a jury. Petitioners then pleaded not guilty to count 2, waived a jury, and after trial were found guilty by the court on July 9, 1946 (R. 7). On July 10, 1946, petitioners were each sentenced to imprisonment

for the mandatory period of twenty-five years on the second count, and one year and a day on each of the other two counts to run concurrently with the sentence on the second count (R. 3-5). They did not appeal (see R. 18).

On September 13, 1948 (R. 8), after the sentences on counts 1 and 3 had expired, petitioner Bent filed a "motion to correct sentence" (R. 5-6). In substance, he contended that count 2 stated no offense against the United States. The District Court on December 3, 1948, held this count to be fatally defective, vacated the sentences, and ordered that petitioners be discharged from custody (R. 6-10).

On appeal by the Government, the Court of Appeals for the Eighth Circuit reversed the order of the District Court and directed it to order that petitioners be apprehended and restored to proper custody (R. 23-24).

SPECIFICATIONS OF ERROR TO BE URGED.

Court of Appeals erred in holding that count 2 of the indictment stated an offense against the United States.

This error is plain, is substantial, and is in violation of constitutional rights and warranting correction by this court.

ARGUMENT.

Defendants recognize the rule that, after verdict, where no question was raised as to the sufficiency of their Indictment, the Indictment must be held sufficient "unless so defective that by no reasonable construction can it be said to charge the offense for which Defendants were convicted." *Muench* v. *U. S.*, (8th Cir.) 96 F. 2d 332, 334-35, but count 2 sought to charge the means of aggravation

under the second section of Sec. 320, Title 18, U. S. C. A., as being an offense, which the statute does not authorize.

The aggravating means have been held not to constitute an offense but merely to ordain the acts warranting the increased penalty. See *Castner* v. *United States,* 139 F. 2d 429 (C. A. 4); *Rowan* v. *United States,* 281 Fed. 137 (C. A. 5), certiorari denied 260 U. S. 721.

The sentence imposed on count 2 is therefore void, as it is in excess of what could lawfully be imposed on the other two counts.

The Circuit Court of Appeals, 8th Circuit, in its Opinion (R. 20), stated:

> "The second count, standing alone, was concededly defective in failing to allege that the defendants, *in effecting the robbery charged in the first count,* put the life of the custodian in jeopardy by the use of a dangerous weapon" (Italics ours).

The Court conceded that Count II lacked an essential element of the offense of armed postal robbery, yet said Court justified its ruling by saying that this omission was a defect in form and not of substance and was thereby cured by virtue of Section 556, Title 18, U. S. C. A., c. 31, 48 Stat. 58, which provides:

> "No indictment found and presented by a Grand Jury in any District or other Court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected, *by reason of any defect or imperfection in matter of form only,* which shall not tend to prejudice the defendant."

The Court also cites Rule 52 (a) of the Rules of Criminal Procedure for the United States District Courts (18 U. S. C. A.), which became effective March 21, 1946, providing:

> "Any error, defect, irregularity, or variance, which does not affect substantial rights shall be disregarded" (R. 21, 22).

The advisory committee notes to Rule 52(a), U. S. C. A., Title 18, say that this rule is merely a restatement of existing law, *i. e.*, 18 U. S. C. 556, permitting formal defects to be ignored.

Rule 52(b) provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

In *Harris* v. *U. S.*, (8th Cir.) 104 F. 2d 41, 43-45, in speaking of count 4 of an indictment under collateral attack.

> "However, where the challenge to an indictment is based upon an omission in the averments thereof of an essential element of a crime, objection thereto is not waived."

Citing: *Berry* v. *U. S.*, (9th Cir.) 259 Fed. 203.

Citing: *U. S.* v. *Hess,* 124 U. S. 483, 8 S. Ct. 571, 574, 31 L. Ed. 516; *U. S.* v. *Carll,* 105 U. S. 611, 26 L. Ed. 1135:

> "It is the duty of the Court under such circumstances to set aside the judgment."
>
> "The essential elements of a statutory offense must be set out in the indictment. These are matters of substance and not of form, and their omission is not aided or cured by verdict."

In this case of *Harris* v. *U. S.*, set out above, the Court was determining whether or not Count IV stated an offense. A reading of the case clearly shows that when the word "indictment" was used, it was used as expressive of Count IV of the indictment and not of the indictment as a whole.

By way of further justifying its opinion, the Circuit Court of Appeals, in the case at bar, stated:

> "Despite its defects, we think that Count II of the indictment was sufficiently informative, when read in the light of the applicable Statute to which the indictment referred, the subject matter of the other Counts, and the indictment as a whole, to support the sentences imposed upon the Defendants."
>
> "The Second Count should be construed to mean what the defendants, their counsel, and the trial court construed it to mean when Bent and Jones entered their pleas of not guilty, were tried, and were sentenced."

We wish to point out, step by step, the errors committed by the Circuit Court of Appeals in its application of the cases cited, and the law (*i. e.*, Sec. 556, Title 18, U. S. C. A., and Rule 52 (a)) to the defect in substance in Count II of the indictment here in question.

Count II stated (R. 1):

COUNT II.

The Grand Jury further charges:

> "That on or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones, did by the use of a dangerous weapon, put in jeopardy the life of Luther H. Kieffer, clerk in charge of Contract Station No. 44 of the Kansas City, Missouri, Post Office, located at 5744 Prospect."

Count II, in substance, states that Petitioners put the life of a postal clerk in jeopardy by the use of a dangerous weapon. Under no law of the United States does the putting of the life of a postal clerk in jeopardy by use of a dangerous weapon constitute a crime. If the pleader meant to allege an aggravated offense of postal robbery, namely:

the robbing of a clerk of a Post Office by use of a dangerous weapon, he should have included the fact that the postal clerk's life was put in jeopardy by use of a dangerous weapon "in effecting or attempting to effect a robbery" or should have impleaded by reference such allegation from Count I. The above clause in quotations is a definite material allegation necessary to constitute a crime under the latter portion of Section 320, wherein a sentence of 25 years is prescribed.

Sec. 320, Title 18, U. S. C. A., is as follows (R. 16):

> "Whoever shall assault any person having lawful charge, control or custody of any mail matter, with intent to rob, steal, or purloin such mail matter or any part thereof, or shall rob any such person of such mail or any part thereof, shall for the first offense be imprisoned not more than ten years; and *if in effecting or attempting to effect such robbery* (italics ours), he shall wound the person having custody of the mail, or put his life in jeopardy by use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

One reading of Section 320 clearly shows that the offense of putting the life of a postal clerk in jeopardy by use of a dangerous weapon is, by itself, not a crime. It must be done "in effecting or attempting to effect such robbery." Nowhere in Count II of the indictment is there any language, which by the wildest stretch of the imagination, could be said to charge that the postal clerk's life was put in jeopardy by use of a dangerous weapon in effecting or attempting to effect a robbery.

The lack of any such allegation in Count II causes Count II to be fatally defective, because it does not charge an offense against the United States. The omission of this vital, necessary element of the crime, which we can only guess the pleader sought to charge in Count II, is an

omission of a material ingredient of the crime, it thereby being a defect in substance and not a defect in form, with which Sec. 556, Title 18, U. S. C. A., deals.

Rule 7, Federal Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, states:

> "(c) Nature and Contents.—The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * * *The allegations made in one count may be incorporated by reference in another count* (Italics ours). The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated * * *."

Clearly, from reading Rule 7, it is obvious that the essential allegations necessary to constitute an offense cannot be supplied from one count into another, unless said material allegations are impleaded by reference.

No allegations were impleaded in Count II of the indictment by reference of any kind. The Petitioners are not contending that the failure to state for Count II an official citation of the Statute is any ground for holding Count II defective, but they do contend that the endorsement at the top of the indictment forms no part of the indictment and nothing can be inferred from the endorsement; as was resorted to by the court of appeals in its opinion (R. 22):

> "The law at present regards citations to statutes or regulations as not part of the indictment."
>
> *Williams* v. *U. S.*, 168 U. S. 382, 389, 18 S. Ct. 92, 42 L. Ed. 509.
>
> *U. S.* v. *Hutcheson*, 312 U. S. 219, 229, 61 S. Ct. 463, 85 L. Ed. 788.

The Court erred in stating that Count II should be construed in the light of:

(1) "The applicable *Statute to which the indictment referred*" (R. 22).

As previously pointed out, the citation of the Statute forms no part of the Indictment.

(2) "*The subject matter of the other counts*" (R. 22).

The subject matter of the other counts cannot be inferred into Count II to supply Count II with the material ingredient which is lacking therefrom. (This would constitute an amendment of the indictment in violation of petitioners' right to be tried only on indictment of grand jury—Const. Amends. 5 and 6, U. S. Const.)

Dunn v. *U. S.*, 284 U. S. 390, 393.

Citing: *Selvester* v. *U. S.*, 170 U. S. 262, 18 S. Ct. 580, 581:

> "In determining the sufficiency of an indictment each count of an indictment is regarded as if it was a separate indictment."
>
> "Each count is, in fact and theory, a separate indictment."
>
> *Hood* v. *U. S.*, 43 F. 2d 353, l. c. 354.

Citing: *Samuels* v. *U. S.*, 232 Fed. 536, 540; *Dealy* v. *U. S.*, 152 U. S. 539, 14 S. Ct. 680, 681:

> "In determining the sufficiency of an indictment, each count must be treated as a wnole and not merely as a part thereof. Each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count."

Samuels v. *U. S.*, 232 Fed 536, 540, 146 C. C. A. 494:

"In determining the sufficiency of an indictment, each count must be treated as a whole and not merely as a part thereof."

McClintock v. *U. S.*, (C. C. A. Kan., 1932) 60 F. 2d 839, 840:

"Each count of an indictment is regarded as if it were a separate indictment, and must be sufficient in itself."

DeJianne v. *U. S.*, (C. C. A. N. J., 1922) 43 F. 2d 353:

"An indictment or information in several counts is a collection of separate bills against the same defendant for offenses, which on their face appear distinct, under one caption and endorsed collectively as true by the Grand Jury, and every separate count should charge the defendant as if he had committed a distinct offense."

U. S. v. *Grant*, (D. C. E. D. Mich., 1924) 1 F. 2d 723:

"Each count in an indictment must be treated as a separate and distinct indictment."

Asgill v. *U. S.*, (C. C. A. Va., 1932) 60 F. 2d 780:

"Each count is a distinct charge of a separate offense."

"Each count in an indictment must be treated as a separate and distinct indictment."

Horn v. *U. S.*, 182 Fed. 721, 105 C. C. A. 163.

Hyde v. *U. S.*, 198 Fed. 610, 119 C. C. A. 493.

Asgil v. *U. S.*, (C. C. A., 4th Cir.) 60 F. 2d 780, 794.

Citing: *Pettibone* v. *U. S.*, 148 U. S. 197, 202, 13 S. Ct. 542, 545, 37 L. Ed. 419:

"The general rule in reference to an indictment is that all the material facts and circumstances of the of-

fense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially by way of recital."

Citing: *U. S.* v. *Hess*, 124 U. S. 483, 486, 8 S. Ct. 571, 31 L. Ed. 516.

And citing the following from *U. S.* v. *Cruikshank*, 92 U. S. 542-558, 23 L. Ed. 588:

(With approval from *U. S.* v. *Mills*, 7 Pet. 142, 8 L. Ed. 636, and *U. S.* v. *Cook*, 17 Wall. 174, 21 L. Ed. 538.)

"The indictment must set forth the offense with clearness and all necessary certainty, to apprize the accused of the crime with which he stands charged, and every ingredient of which the offense is composed must be accurately and clearly stated."

And further in considering Sec. 1025, Rev. Stat., 18 U. S. C. A., Sec. 556, l. c. 784, states:

"While giving full effect not only to the letter but to the spirit of the statute, it must be considered in connection with the Sixth Amendment of the Constitution, which requires that the defendant be informed of the nature and cause of the accusation, this information to be set out through an indictment by the Grand Jury as guaranteed in the Fifth Amendment."

"General and undefined charges of crime should not be encouraged. They are not in harmony with the genius of a free people living under a written Constitution."

U. S. v. *Denny*, (7th Cir.) 165 F. 2d 671, Cert. Denied 68 S. Ct. 662:

"Of course the statutory provision that no indictment shall be insufficient by reason of any defect in form only, which shall not tend to the prejudice of the

defendant, 18 U. S. C. A., Sec. 556 * * * and 28 U. S. C. A. * * * grants power to the court to ignore only formal imperfections * * *. For to extend it to include the further power to permit amendment of an indictment in any matter of substance would offend against the same Constitutional provision * * * Fifth Amendment."

CONCLUSION.

Petitioners pray they be granted a rehearing on their petition for certiorari.

Counsel certifies that this petition for rehearing is made in good faith and not for delay.

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